NOTES OF CASES.

Banks and Banking—Liability for Deposit Received after Banking Hours.—In Farmers' Bank and Trust Co. *v.* Bashears, 231 S. W. 10, the Supreme Court of Arkansas held that where it was the custom of employees of a bank to receive deposits after the usual banking hours to accommodate belated customers, the bank cannot escape liability for a deposit so received on account of the time of the deposit.

The court said in part: "The contention of appellant's counsel is that the court should have given a peremptory instruction for the reason that the undisputed evidence shows that the money was received by the bank's employees, if at all, after banking hours, when there was no officer to receive such deposit, and also the fact that the undisputed evidence shows that appellant waited an unreasonable length of time before he made objection to the statement sent to him omitting this deposit. We think the contention of counsel in both respects is unfounded. There is testimony tending to show that it was the custom of the employees of the bank to receive deposits in the bank after the usual banking hours for the purpose of accommodating belated customers. The testimony also warranted a submission of the issue as to whether or not the objection made by appellee to the statement of his account was within a reasonable time. The rule approved by this court in several cases was stated by the Supreme Court of the United States in Leather Mfgrs.' Nat. Bank *v.* Morgan, 117 U. S. 96, 29 L. Ed. 811, 6 Sup. Ct. Rep. 657, as follows:

" 'While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business.' Citizens' Bank & Trust Co. *v.* Hinkle, 126 Ark. 266, 189 S. W. 679; Bank of Black Rock *v.* B. Johnson & Son Tie Co., 229 S. W. 1."

Bills and Notes—Words "as per Contract" as Affecting Negotiability of Promissory Note.—In Strand Amusement Co. *v.* Fox, 87 So. 332, the Supreme Court of Alabama, by a divided court, held that under Negotiable Instruments Law (Code 1907, sec. 4960), providing that an unqualified order or promise to pay is unconditional, though coupled with a statement of the transaction which gives rise to the instrument, a promissory note, being in the usual form, containing the usual phrase "value received, with interest," and usual clause waiving exemption, etc., is not rendered nonnegotiable by the insertion in the blank space opposite the word "No", in lower left-hand corner of note, of the words "as per contract," since to destroy negotiability the reference to a collateral contract must show that the obligation to pay is burdened with conditions of the contract, and statutory provisions are merely declaratory of common law.

The court said in part:

"Where the promise to pay is made 'subject to some other contract referred to, the authorities seem to be agreed that the obligation is conditional, and negotiability is destroyed. Klots, etc., Co. *v.* Manufacturers', etc., Co., 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N. S.) 40, and note, citing numerous cases; L. R. A. 1918B, 639; 8 Corp. Jur. 124, sec. 216. So, where the payment was to be made 'according to the requirements of a certain agreement of even date herewith,' the note was held nonnegotiable. Chicago, etc., Bank *v.* Chicago T. & T. Co., 180 Ill. 404, 60 N. E. 586, 83 Am. St. Rep. 138.

"Where the words 'as per terms of contract' were written after the words 'value received,' it was held that negotiability was not affected by the reference. Nat. Bk. of Newbury *v.* Wentworth, 218 Mass. 30, 105 N. E. 626.

"In Slaughter *v.* Bank of Bisbee, 17 Ariz. 484, 154 Pac. 1040, it was held that a memorandum under the signature of the maker, 'for payment under contract of even date,' did not affect negotiability, and the court, per Ross, C. J., said:

" 'The usual way to condition or to make contingent a promise to pay is to use language clearly carrying that intention and purpose either by direct expression or by reference to some extrinsic contract in such manner as to make the payment of the note subject to the terms and conditions of the contract. * * * If it can be said that the expression (quoting it) fairly or reasonably means that the note was given and its payment was to be made "subject to the terms of the contract," therein referred to, it would follow that, if the contract was executory, the payment of the note was subject to its conditions. There is nothing in the language to indicate that the contract referred to was an unexecuted contract. From what appears in the expression the contract may have been fully performed and executed. It has neither subject nor predicate; it does not assert or affirm anything—it is a mere combination of words from which it may be inferred that a contract had been entered into between somebody on its date. We cannot enter into the speculation of inserting or supplying omitted words, as appellant would have us do, in order to give it the force and effect of limiting and qualifying the unconditional promise of the makers as contained in the body of the note—we must accept the words actually used, which do not declare anything, or assert anything, or affirm anything, but are a mere allusion to or signpost of the transaction out of which the note originated. It does not mean the same, as suggested by appellant, as the expression "this note is made subject to contract of even date," for in the latter expression there is carried the idea of a subsisting and unfulfilled contract, an executory contract. * * * In the case at bar there is an absence of language to indicate that this note was to be burdened with the conditions of any agreement. At most it is a mere reference to the origin of the

transaction and "constitutes notice of the existence of the contract," but "not of the breach of."

"The court alluded to the use of Klots, etc. *v.* Mfrs., etc., Co., supra, and quoted with approval its statement that if the memorandum 'merely constitutes notice of the existence of the contract,' and not of the breach thereof, it would not affect negotiability."

"In Doyle *v.* Considine, 195 Ill. App. 311, it was held that negotiability was not affected by a memorandum that 'this note is given in accordance with a land contract of even date.' The memorandum in that case is materially different from the one which led to a different conclusion in 190 Ill. 404, 60 N. E. 586, 83 Am. St. Rep. 138, cited supra. In Waterbury-Wallace Co. *v.* Ivey, 99 Misc. Rep. 260, 163 N. Y. Supp. 719, the words 'as per contract of Nov. 12, 1915,' followed the phrase 'value received,' and it was held that negotiability was not affected. In that case it was observed that—

" 'The tendency of the courts is to construe commercial instruments having on them a memorandum or reference to dealings between the parties as negotiable, if they in other respects have all the characteristics of negotiability'—a principle of construction which is affirmed in the text of 8 Corp. Jur. 119, sec. 212.

"In First Nat. Bk. *v.* Badham, 86 S. C. 170, 68 S. E. 536, 139 Am. St. Rep. 1043, a majority of the court held that the words 'as per contract of November 23, 1899,' following the phrase 'for value received,' did not render the note nonnegotiable. The headnote of the reporter in this case is erroneous, as an examination of the individual opinions of the justices will clearly show. This error has led to its erroneous citation in several instances by judges and annotators. In Coleman *v.* Valentin, 39 S. D. 323, 164 N. W. 67, it was held that the memorandum, 'This note is one of a series given in payment of land under the contract this day executed,' did not affect negotiability."

McClelland, J., dissenting, said: "The original notes, the negotiable or nonnegotiable character of which is a controlling inquiry on this appeal, are certified to this court for its inspection. They are on printed forms, the date, maturity, and amount being filled in in handwriting. On the lower left-hand side of the face of the paper, opposite the signature, these words are written in in ink, in the same handwriting and ink making the signature to the notes: 'As per contract.'

"To my mind, the opinion of Monroe, Ch. J., in Continental Bank & Trust Co. *v.* Times Pub. Co., 142 La. 209, L. R. A. 1918B, 632, 76 So. 617—a deliverance in immediate point—demonstrates the fact that the quoted words on these notes operated to destroy their negotiability. I shall not attempt to reiterate what that able jurist has so forcefully expressed.

"The majority of this court make material to their view the place on the notes where the quoted phrase was written; this notwithstanding it has been long decided by this court, as well as generally elsewhere, that matter indorsed on a note, even in the margin, becomes a

part of the instrument—'as much so as if it had been set forth in the body of the instrument.' Seymour *v.* Farquhar, 93 Ala. 292, 8 So. 466; Sacred Heart Church Bldg. Committee *v.* Manson, 203 Ala. 256, 82 So. 499, and other authorities therein cited. If this established doctrine is accorded appropriate deserved effect in this instance, a material consideration on which the majority predicated their conclusion would be removed. I see no reason to deny this rule's effect in the circumstances here involved. Code, § 4974 (§ 17 of the Uniform Negotiable Instruments Law), provides, through subd. 4: 'Where there is conflict between the written and the printed provisions of the instrument, the written provisions prevail.'

"Unless it can be held that the written words 'as per contract' are denied any effect whatsoever, they institute a conflict with the printed words (in the form here used), manifesting an unqualified 'promise to pay to the order of' the payee. It is not to be supposed, much less assumed, that this phrase 'as per contract' was written on the instrument without purpose or effect."

Constitutional Law—Validity of Constitutional Provision Depriving Courts of Power of Determining Constitutionality of Statute.—In People *v.* Western Union Tel. Co., 198 Pac. 146, the Supreme Court of Colorado held that a provision of the constitution of that state providing that no court except the Supreme Court shall have any power to declare any law of the state in violation of the federal or state constitutions is null and void.

The court said in part: "What the whole people of a state are powerless to do directly, either by statute or Constitution, i. e., set aside the Constitution of the United States, they are equally powerless to do indirectly, either by a pretended authority granted to a municipality or by a popular election, under the guise of a recall. The original Constitution of Colorado was a solemn compact between the state and the Federal goverment, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save according to their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violation of the supreme compact, and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union and no power in its people to command their courts to do so. That issue was finally settled at Appomattox.

"When a Federal constitutional question is raised in any of the trial courts of Colorado the right is given, and the duty is imposed